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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 176

MORRIS LELAND,

Appellant,

vs.

THE STATE OF OREGON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OREGON

BRIEF OF APPELLANT

THOMAS H. RYAN,
ANTHONY PELAY, JR.,
JOHN D. RYAN and
HAROLD L. DAVIDSON,
Counsel for Appellant.

INDEX

Subject Index

	Page
Appellant's Brief	1
Opinion Below	1
Statement of Jurisdiction	1
Question Presented	2
Statutes Involved	14, 45
Statement of Facts	3
Summary of Argument	12
First Assignment of Error	14
Argument (Requirement of Oregon law that defendant prove insanity beyond a reasonable doubt and further, abolition of a certain type of insanity as a defense to a crime deprives defendant of due process of law.)	15
Second Assignment of Error	45
Argument (Refusal of Court to permit examination of confession taken from defendant deprived defendant of his rights under the 14th Amendment of the United States Constitution.)	46
Third Assignment of Error	59
Argument (Court erred in sustaining defendant's conviction.)	59
Conclusion	60

Table of Cases Cited

State v. *Brake*, 99 Ore. 310 53

State v. Butchek; 121 Ore. 141, 253 Pac. (2d) 367, 46, 51, 57, 58

State v. *Folkes*, 174 Ore. 568, 150 Pac. (2d) 17 47, 51, 57, 58

State v. *Garver*, 190 Ore. 291, 225 Pac. (2d) 771 19

State v. *Grieco*, 184 Ore. 253, 195 Pac. (2d) 183 15, 18, 19, 33

State v. *Hanson*, 25 Ore. 391, 35 Pac. (2d) 976 18

State v. *Hassing*, 60 Ore. 81, 118 Pac. (2d) 195 21

State v. *Leland*, 190 Ore. 598, 227 Pac. (2d) 786 19

Page

State v. *Riley*, 147 Ore. 89, 30 Pac. (2d) 1041 18
State v. *Strasburg*, 60 Wash. 106 ..... 17, 23
State v. *Wallace*, 170 Ore. 60, 131 Pac. (2d) 222 ..... 15, 18
State v. *Yee Guck*, 99 Ore. 231 53
People v. *Kirby*, 2 Park Cr. Rep. 28 16
People v. *McCann*, 16 N. Y. 58 16
People v. *Splague*, 2 Park Cr. Rep. 43 16
People v. *Lake*, 2 Park Cr. Rep. 215 16
Adamson v. *California*, 332 U. S. 46, 67 S. Ct. 1672 ..... 40, 44
DeJonge v. *Oregon*, 299 U. S. 353, 57 S. Ct. 255 41
Herbert v. *Louisiana*, 272 West 312, 475 S. Ct. 103, 48 ALR 1102 42
Malinski v. *New York*, 324 U. S. 40, 65 S. Ct. 781 50
McNabb v. *United States*, 318 U. S. 332, 63 S. Ct. 608 ..... 50, 57
State v. *Tippett* (Mo.), 296 S. W. 132 53
State v. *Dorsey*, 207 La. 928, 22 S. Ct. 273 54
Hurtado v. *California*, 110 U. S. 516, 4 S. Ct. 111 40
Marshall v. *Dow*, 176 U. S. 601, 20 S. Ct. 448 40
McNaghten's Case, 8 Eng. Reprint, 718 ..... 26, 31
Mugler v. *Kansas*, 123 U. S. 623, 8 S. Ct. 273 41
Palko v. *Connecticut*, 302 U. S. 319, 58 S. Ct. 149 40
Phyle v. *Duffy*, 334 U. S. 431, 68 S. Ct. 1131 ..... 17, 23, 41
Powell v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55 ..... 49, 51
Sinclair v. *State*, 161 Miss. 142 ..... 17, 23
Slaughter House Cases, 16 Wall. (U. S.) 32 44
Solesbee v. *Balkom*, 339 U. S. 9, 70 S. Ct. 457, 17, 23, 28, 33, 39, 41
Tot v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 22, 24, 25, 40, 43
Twining v. *New Jersey*, 211 U. S. 78, 29 S. Ct. 14 40

TEXTS CITED

Black's Constitutional Law, 2nd Ed. 15
Pacific Northwest Quarterly 16
Textbook of Psychiatry, Henderson and Gillespie 33, 35
Practical Clinical Psychiatry, Ebaugh & Strecker 34
Outlines of General Psychopathology, Malamud 34
Textbook of Psychiatry, Blenler 35
Legal Aspects of Psychiatry, Zilboorg 36

STATUTES CITED

Page

Section 10-041, Oregon Compiled Laws Annotated . . 53, 55
Section 23-122, Oregon Compiled Laws Annotated, 2, 13, 14, 15, 18
Section 26-929, Oregon Compiled Laws Annotated, 2, 12, 14, 15, 16, 17, 18, 23
Section 26-1542, Oregon Compiled Laws, Annotated . 45, 46
Section 26-1547, Oregon Compiled Laws, Annotated . 45, 46
Section 26-1556, Oregon Compiled Laws Annotated . 46

United States Constitution:

14th Amendment . . . 2, 3, 14, 16, 27, 39, 40, 41, 42, 51, 53

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Opinion Below

The opinion of the Supreme Court of the State of Oregon is reported in 190 Oregon 598; 227 P (2nd) 785. The denial of the petition for rehearing is found in the Journals of the Oregon Supreme Court for February 28, 1951, noted as a memorandum decision in 52 Oregon Advance Sheets, Volume 8. Said denial for the petition for rehearing was not reported.

Jurisdiction

The judgment of the Circuit Court of the State of Oregon for the County of Multnomah, sentencing the appellant

to death, was argued on appeal before the Supreme Court of the State of Oregon on October 4, 1950, and affirmed on February 7, 1951. The petition for rehearing was denied on February 28, 1951, and thereafter an appeal was taken to the Supreme Court of the United States, the same having been filed after an appeal was allowed by the Supreme Court of the State of Oregon. The Supreme Court of the United States noted probable jurisdiction and granted a motion to procede in *forma pauperis,* on October 8, 1951. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257, based particularly on Subdivision 2 of said Section 1257.

Question Presented

The question presented by this appeal is whether or not the Supreme Court of the State of Oregon in its decision recorded in 190 Oregon, page 598, 227 Pac. (2nd) 785, erred as follows:

ASSIGNMENT OF ERROR NO. ONE: In upholding the validity of the Oregon Statutes regarding proof of insanity, despite defendant's contention that said statutes, 26-929 and 23-122, O.C.L.A., deprived defendant of his life and liberty without due process of law as guaranteed by the 14th Amendment of the United States Constitution in that defendant was required to prove he was insane beyond a reasonable doubt and was not permitted by statute to establish the mental disease from which he was suffering as defense to the crime.

ASSIGNMENT OF ERROR NO. TWO: In upholding the refusal of the trial Court to make available to defendant's counsel before trial the confession taken from the defendant before he was advised of his right to be represented by counsel before he was taken before a Magistrate as provided by law, and that said error deprived defendant of his life and liberty without due process of law as guaranteed by

the 14th Amendment of the Constitution of the United States.

ASSIGNMENT OF ERROR NO. THREE: The Court erred in sustaining defendant's conviction of a sentence to death in the lethal chamber.

Statement of Facts

The defendant, Morris Leland, 22 years of age, was convicted of murder in the first degree and sentenced to death in the lethal chamber, the jury having failed to recommend leniency. In due course appeal was taken to the Supreme Court of the State of Oregon, which Court affirmed the judgment of the trial court. From said holding an appeal was taken to the Supreme Court of The United States of America. Probable jurisdiction was noted, and permission to proceed in *forma pauperis* granted.

The following is a summary of the points raised in the appeal to the Supreme Court of the State of Oregon:

Error in refusing a postponement of the trial date as requested by defendant. (Assignment of Error No. 1 below.)

Error in refusing to allow defendant's motion to examine defendant's confession made before defendant had preliminary hearing or was represented by counsel. (Assignment of Error No. 2 below.)

Error in excusing jurors who had conscientious scruples against capital punishment, although under Oregon law, the jury in effect has the sentencing power in their right to make or withhold a recommendation of mercy. (Assignment of Error No. 3 below.)

Error in the judge's commenting on parole possibility in answer to juror's question. (Assignment of Error No. 4 below.)

Error in introducing irrelevant and cumulative evidence calculated to inflame the passions and prejudices of the jury. (Assignments of Error Nos. 6, 8, 10, 11 and 15 below.)

Error in introducing confessions of defendant which were taken before he was advised of his right to counsel or given a preliminary hearing. (Assignments of Error Nos. 5, 7, and 9 below.)

Error in admitting certain improper testimony. (Assignments of Error Nos. 12, 13, and 14 below.)

Error in permitting improper and inflammatory argument by the State. (Assignment of Error No. 18 below.)

Error in failing to allow certain motions for mistrial. (Assignments of Error Nos. 17 and 18 below.)

Error in refusing to withdraw certain questions from the jury, based on the State's failure to sustain the burden of proof regarding willfulness and premeditation. (Assignment of Error No. 16 below.)

Error in several matters in the instruction of the jury. (Assignment of Error No. 19 below.)

A full statement of the facts of this case requires a review of certain events in Morris Leland's life. In 1933, at the age of six years, he was involved in an automobile accident in which he received a severe head and brain injury (Tr. 173 et seq.). The child was taken to the Good Samaritan Hospital, in Portland, where he was treated for the injuries sustained. He was released in a few days and returned to his home. Approximately two weeks later his parents became concerned about his behavior and sought further medical treatment for him. The doctor ordered his return to the hospital and a psychiatrist, Dr. Burkes, was consulted. The microfilmed records of the Good Samaritan Hospital disclose that this child suffered a *personality change*. This record of his treatment made eighteen years ago was introduced and received in evidence as Defendant's Exhibit No. 20.

The seriousness of this dislocation of defendant's personality and mental health can best be appreciated by considering the fact that his parents paid for hospitalization

and psychiatric treatment. Only a grave condition could compel these people in the middle of the depression to sacrifice their own and their other children's welfare by this considerable expenditure. Bear in mind, that at this time, as at all other times, the Lelands were poor and burdened with the support of a large family.

The terrible consequences of this accident include the crime charged herein. This crime is the climax of a story of tragedy that started from defendant's *personality change*. For, from that time forward, the evidence conclusively shows that Morris Leland was different. And the word "different" sums up the situation more completely than any other description of his condition. (See Tr. 177 et seq. Clara Lolk; 185 et seq. Harold Leland, his father; 250 et seq. Maud Leland, his mother; 256 et seq. Irma Ness; and 264 et seq. Georgina Inghram.)

These witnesses testify that after this accident defendant was sullen, introspective, and lacked the personality and mental powers of a normal child. Typical of their testimony is the statement of Mrs. Ness found on page 262 of the transcript:

> "Well, my opinion is that *he is not normal in no way at all.*"

Or Mrs. Inghram's testimony on page 264:

> "* * * and he never did come around the children to be actually playing. *I never did see him smile.* And that was my experience with the child. *He just wasn't a normal, sane child* * * *"

Or Mrs. Lolk's testimony on page 179:

> "Well, he seemed to be such a pitiful boy; that is one reason why. *He wasn't—well, I would say that he just wasn't all there:* * * *

And on page 183:

"He just looked dull, *duller than any of the other children.*"

Or on page 184:

"Well, *I feel that the boy was not in his right—was not in his right mind* when he was little."

His mental illness was further manifested by his poor progress in school, his involvement in petty criminal activity at the early age of seven or eight, and his general inability to respond normally to even the problems of childhood. As he grew older he engaged in more serious offenses, car thefts, larcenys, and finally, in his early teens, crimes of sex. He was unable to retain employment. He lived like an animal, sleeping during daylight hours and prowling at night. When he slept at home he refused to sleep in a bed, but insisted on sleeping on the floor near a stove. He would fly into fits of anger; and his story is replete with attacks on members of his family, including his mother. This, though the family made every effort and sacrifice to solve the problem caused by his insanity. At one time he attempted to burn the family home. Another time he committed a criminal assault on an older woman, a friend of the family.

Finally, when only sixteen, he committed a crime which resulted in his being examined by a psychiatrist. This crime, a rape at the point of a gun on an older woman and a complete stranger, was too inexplicable that it was not treated as a punishable offense. Instead, he was, at the recommendation of the examining psychiatrist, sent to the Oregon State Hospital for the Insane for observation.

Dr. Haskins, now Chief Psychiatrist at the Veteran's Hospital, Roseburg, Oregon, found this boy unable to determine right from wrong, and he further found that if he received proper treatment he might possibly be helped and his

condition alleviated. He recommended that he be treated by the State Hospital (Tr. Page 270).

Unfortunately, the State Hospital at this time was inadequate. It was overcrowded, understaffed, and the authorities there used this lack of facilities as an excuse for turning loose on the public this known and mentally ill sex offender. This tragic negligence by the State of Oregon, permitted a continuation of the past conduct which finally resulted in the crime here charged.

Subsequent to this defendant committed further and continued offenses. He was several times in custody. He was eventually inducted into the army and while there again came to attention of medical men. He was given a discharge from the army because of his mental condition and received a pension from the Veteran's Administration based on an aggravation caused by another head injury suffered while in the army (Def. exh. 19).

This exhibit is further significant in that the X-Ray report contained therein shows that there is a clouded area in the skull of defendant.

Thus, in August, 1949, sixteen years after the beginning of this story, the stage was set for the act which is charged as a crime herein. The foregoing facts are an integral part of said act and explain the reason why it should not be punished as a crime.

The place where this crime was committed was within the city limits of Portland, Oregon, along the banks of the Willamette River near the St. John's District. This area is waste land, excepting where there are industrial plants or wharfs. It is situated far below the bluff on which the residential district is located. Except for railroad tracks there are no roadways, and access is had only by a path down the bluff which extends for a distance of approximately one half mile. It is overgrown with brush and small

trees. Unless visited by railroad workers switching trains, there is seldom any occasion for anyone to enter here.

On August 5, 1949, Thelma Taylor, a 15 year old girl, was beaten and stabbed to death at this lonely place along the Willamette River near the St. Johns district of Portland. Five days later Morris Leland was arrested in the possession of a stolen car. The place of his arrest was in the same section of Portland. Morris Leland had a considerable police record and was well known to the officers of that part of town. At the time of his arrest he had been awake from early morning and upon his arrival at the police station, at approximately 2:00 A.M. (Tr. 56) he asked to talk to a homicide officer (Tr. 57).

Thereafter during the course of approximately 20 hours he was questioned by several officers without respite. He was taken twice to the scene of the killing, compelled to make two written statements, one of which was taken by six foot six, 315 pound Detective McKeown (Tr. 166) which was taken after defendant had been kept awake in custody for 20 hours, and according to all the record available had been awake from the preceding morning, and additional 18 or more hours, thus this last "voluntary" statement was taken after 38 hours without sleep and under the most tense conditions.

We will not here rehearse in detail each of the several statements made both orally and in writing. Suffice it to say that there are a few variations in the facts, and in the discussion of the story as hereinafter related these portions will be noted. The only evidence connecting Morris Leland with the crime charged is that provided by his confessions, and these acts are presented here as they are related in those confessions. Unless otherwise stated, the facts herein related are taken from Plaintiff's Exhibit 15.

Early on the morning of August 5, 1949 Morris Leland met Thelma Taylor in St. Johns at a place some fifteen or more blocks from the beginning of the path leading to the

place of the killing, which in turn was from 1,000 feet to one-half mile further on. The meeting took place on the street, and according to the written statements of defendant, Thelma Taylor voluntarily accompanied him to this path and then down the path to an unoccupied spot not far from the river. This was the place where the young woman met her death.

The deceased was going bean picking and had a date to meet a friend at the bus at about 5:00 A.M. that morning. Instead she went with defendant through the whole of the St. Johns district and down to this isolated area along the river. Great effort was made by the able District Attorney to infer that she was forced to go all this distance at the point of a knife. The probability of force being employed over such a distance is remote, and it is only fair to presume, from the absence of any written statement as to force being employed, that none was used. This attempt to insinuate force into this part of the proceeding is an example of over-zealousness by the District Attorney, which we point out as a part of the statement of facts, and which characterizes the whole course of the trial of this case.

The two spent all that day and the next night and until the middle of the next morning together at this place along the Willamette River where Morris Leland had been sleeping for several days prior thereto. This place itself is interesting in that it reflects the fact that Morris Leland lived like an animal in a lair, a fact which is eloquent testimony of his defective reason which we contend legally excused his act.

The confession of defendant states that he started to have sexual intercourse with the deceased, but he did not complete the act as the girl was a virgin (see Plf. Ex. 15, p. 16). (Tr. of Rd., page 366.) That evening she spent with the defendant on blankets which he had at this place. The next morning they awoke about 7:00 o'clock; some time thereafter she asked if she couldn't return to her home, but he

wanted her to wait until evening so that he could leave in the dark and not be arrested.

Within approximately 100 feet from the place where they were there was a railroad switching spur and at this time cars were being switched upon which there were railroad employees visible to the parties, and the girl started to scream. The following is the statement taken from pp. 41-43 (Tr. of Rd., pages 363-364) of Plaintiff's Exhibit 15, which relates defendant's reaction to this screaming:

"CAPTAIN BROWNE:

Q. What was your reason for wanting to kill her?

A. Because I had no reason at first.

Q. *Well, when you killed her, what made you make your decision that you should kill her?*

A. *It just came to me* (snapping fingers), *just the second she started screaming.*

Q. Yes, but you said you previously had picked up this bar in case she started screaming?

A. Just to knock her out.

Q. Just to knock her out?

Q. But you picked up the bar with the intention of using it if she started to scream?

A. If I couldn't quiet her anyway.

Q. Did you make any other attempt?

A. When she started to scream?

Q. Yes.

A. No.

Q. You had the bar for that purpose. When you awakened and she was twenty feet away, was she walking back?

A. No.

Q. Did you call her back?

A. I told her she had better come back.

Q. You told her she had better come back, and then did you pick up that bar of steel then?

A. Not at that time, not till later.

Q. What was the reason why you didn't want her to scream or to leave you?

A. Because I wanted to wait until that night.

Q. Why?

A. I would go with her.

Q. You didn't want to be seen, did you?

A. That is right.

Q. Well, if you had permitted her to go home you wouldn't have had to go with her necessarily, would you?

A. Well, I would have had to leave the vicinity.

Q. Did she say she was going to tell her mother or the police?

A. She was bound to.

Q. Was that the reason you killed her?

A. No; as I stated a little while ago, the reason I killed her was because she started screaming, I had no intention of killing her originally.

Q. What was your intention originally?

A. What I told you at the first of the story.

Q. Did she see the knife when she first met you?

A. I guess not, because I had it inside my coat at that time."

It will be seen that Morris Leland acted under the impulse of the screaming of the deceased and clearly shows his state of mind by describing his idea of killing her as coming to him at the snap of a finger. It is only fair to relate that the testimony of the psychiatrists all state that this was the typical behaviour of the particular type of mental disease from which the defendant was suffering, and that it was probable that his intention to kill the deceased was formed exactly as here described.

After the killing he covered the body in a pyre-like arrangement using driftwood and blankets to partially conceal the deceased. During the following five days he remained in the area of St. Johns and was picked up as above mentioned.

The written statement taken by the court reporter (Plf. Ex. 15) was taken at 7:15 in the morning conveniently be-

fore the opening of court, and while the defendant was exhausted by the long night of inquiry and visits to the scene of his alleged criminal act.

The testimony in the trial relative to defendant's insanity characterized him as a constitutional psychopath, or what is known as a psychopathic personality, a disease which is characterized by a feeblemindedness other than intellectual in which there is commonly defective emotional control and lack of inhibition in the volitional sphere. It is a disease which results in an inability to plan or to make a choice between right and wrong, or to distinguish between right and wrong. This type of mental illness historically was termed moral insanity and did not find favor with the courts or with medical men until its nature and effect became understood during recent years. It can be treated. Persons afflicted with this disease are dangerous because of this disease, and are unable to control themselves because of this lack of inhibition in their volitional sphere.

Its cause can be an injury to the head, can be hereditary, and it can be induced by certain infectious diseases. It is as real as a broken bone. We, in this statement of facts, make a categorical statement that the true psychopath is mentally not responsible for his acts. He cannot plan or premeditate and cannot control himself. The law should recognize the scientific fact and act accordingly in dealing with these people.

Summary of Argument

The argument of this case can be summarized in the three Assignments of Error on file therein. First Assignment of Error relates to the question of the Oregon statutes requiring a defendant to prove his sanity beyond a reasonable doubt when relying on that defense. (Sec. 26-929 OCLA); and the prohibition against relying on the fact that a defendant has a morbid propensity to commit

a crime although it may be a mental disease. (Sec. 23-122 OCLA).

The second Assignment of Error has to do with the refusal of the State to make available to defendant's counsel a confession taken under the pretext that it can be used *for or against the defendant.* Said confession having been taken prior to the defendant having been advised of his right to counsel and prior to his having been granted a preliminary hearing as provided by Oregon law. In the third Assignment of Error the general assignment of a violation of error by the Court below. The substance of all these Assignments of Error is that the defendant has been deprived of due process as required by the Fourteenth Amendment.

The question of insanity is an integral part of criminal procedure. *Oregon is a minority of one in requiring proof of insanity beyond a reasonable doubt.* The rule, stringent as it is, is made worse by barring proof of the type of insanity from which defendant suffers; although this is a medically recognized disease of the mind. To require an impossible burden of proof denies due process; and to refuse to accept scientific reality and medical fact is tantamount to denying all process on this phase of the case.

The questions arising under our Second Assignment of Error are not less vital than those under our first. The confession was taken from the defendant before he was aware of his rights to counsel and before he had been granted a preliminary hearing; but more, it was taken on the pretext that the same could be used for or against him. Due process of the law requires the defendant to be represented by counsel and that representation be made effective. It is our contention that the refusal to permit counsel to see the confession and to use the same for defendant as was promised to defendant, effectively denied due process. Counsel was unable to prepare his case, to argue his case or to

consult with psychiatric experts before the trial as this confession was in effect the whole case. Further, the second confession was taken after defendant had been in custody 20 hours and kept awake all that time. Our court ignored the requirement defendant be taken before a magistrate, granted counsel, and advised of his right against self-incrimination.

ARGUMENT

Assignment of Error No. One

The Courts below erred in upholding the validity of Oregon's statutes regarding the proof of insanity despite defendant's contention that said statutes, 26-929 and 23-122, OCLA, deprived defendant of his life and liberty without due process of law as guaranteed under the 14th Amendment to the United States Constitution; in that defendant was required to prove he was insane beyond a reasonable doubt and was not permitted by statute to establish the mental disease from which he was suffering as a defense to a crime.

> Section 23-122. *Morbid propensity as defense.* A morbid propensity to commit prohibited acts, existing in the mind of a person, who is not shown to have been incapable of knowing the wrongfulness of such acts, forms no defense to a prosecution therefor.
>
> Section 26-929. *Insanity must be proved: Effect of intoxication.* When the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt; and no act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition; but whenever the actual existence of any particular motive, purpose, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the defendant was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

ARGUMENT

Oregon a Minority of One:

In our first Assignment of Error we question the constitutionality of the Oregon law regarding the proof of insanity. We have complained that Section 23-122 OCLA deprives the defendant of his right to prove as a defense to the crime charged a scientifically accepted and medically recognized mental disease. Section 26-929 makes Oregon *a minority of one* in that it requires a person asserting the defense of insanity to a crime to prove his insanity beyond a reasonable doubt. *State* v. *Wallace*, 170 Ore. 60, 131 P. 2d 222; *State* v. *Grieco*, 184 Ore. 253, 195 P. 2d 183. Thus the State of Oregon accomplishes the evil that Black in his text on Constitutional Law warned against. See Black's Constitutional Law, 2d Edition, page 519.

> "The constitutions were not intended merely to secure the right of trial by jury, but also insure that it should be continued in existence as a substantial and valuable protective right to private suitors. Now it is evident that it would be entirely feasible for a state legislature, if so minded, to impose conditions upon this right as to make practically unavailing to a party for his protection, yet without denying it in express terms. But this would be a palpable violation of the spirit and intent of the constitutional provision, and the Courts would hold any such restrictions upon the right as not only unconstitutional but a total denial of it."

In treating this assignment of error, it would be interesting to historically review the origin of Section 26-929 OCLA. It is particularly interesting and important to determine how a single jurisdiction came to have a rule of such severity. When you couple this rule with the effect of 23-122 OCLA which denies the defendant the right to prove a recognized mental disease, which is the particular mental

disease from which the defendant is suffering in this case, you have a two-fold deprivation of due process of law. Either of these rules, standing alone, would deprive the defendant of this right guaranteed under the 14th Amendment of the Constitution of the United States.

History of Legislation:

We will treat these two sections together, discussing the practical application of these two rules and showing how both of them are contrary to the accepted principles of justice. We will also show how one of these sections came into Oregon Law through a mistake made by the original draftsmen of the Oregon Criminal Code. This in itself, of course, would not render the law unconstitutional; but when a mistake creates a law which in itself denies due process, it can be well considered by this Court in determining whether or not the law should be declared unconstitutional.

The task of preparing the Oregon Criminal Code was assigned to a Committee headed by Judge Matthew Deady. Nominally he had assistance. In effect, the work largely fell on him (See Pacific Northwest Quarterly, Volume 27, No. 1, Article by Arthur S. Beardsley). The legislature, desiring to enact a complete criminal code and being encouraged to act immediately by the then governor, adopted Judge Deady's code in its entirety, including therein that Section which is now 26-929, OCLA. This was entitled in the original code Section 204. Apparently the basis of this criminal code was laws of the State of New York; and, for the support of the rule that the defendant should prove insanity beyond a reasonable doubt when asserted as a defense for a crime the codifier cited three New York cases, *People* v. *Lake*, 2 Park Cr. Rep. 215; *People* v. *Kirby*, 2 Park Cr. Rep. 28, and *People* v. *Sprague*, 2 Park Cr. Rep. 43. However, in a later New York case, *People* v. *McCann*, 16 NY 58 (2 Smith), the New York court rejected the rule that

the defendant should be required to prove his insanity beyond a reasonable doubt and apparently adopted a rule that the State should prove sanity beyond a reasonable doubt.

A reading of the New York cases cited might well indicate that there was some question whether or not New York ever did actually have a rule such as was codified by Judge Deady, the now Section 26-929. Regardless, New York shortly after the enactment of the Deady Code unequivocally abandoned the stringent rule of proof of insanity which has since that time been the codified law of Oregon.

Thus, by error, or at least without much consideration and no debate, the present rule became law. Oregon became the only state in the Union which definitely adopted this oppressive rule. We will now briefly discuss other instances where the right to prove insanity has suffered by legislative action and the action by the courts in declaring said laws unconstitutional.

There have been attempts in two states to completely abolish the defense of insanity. Both the State of Mississippi and the State of Washington attempted to do so. In both of these states their Supreme Courts held that the abolition of this defense violated due process of law. See *Sinclair* v. *State*, 161 Miss. 142, and *State* v. *Strasburg*, 60 Wash. 106. These two cases so far as counsel has been able to determine are the only two instances in which the appellate court has passed on this precise question in this matter. See also *Phyle* v. *Duffy*, 334 U. S. 431, 68 S. Ct. 1131 (See Note 1), also *Solesbee* v. *Balkcom*, 339 U. S. 9, 70 S. Ct. 457.

Note 1. While in the last two above cited cases, Phyle v. Duffy, and Solesbee v. Balkcom, the right to trial by jury before conviction was conceded by implication, there is no U. S. Supreme Court decision directly on this particular question. The answer is seemingly so obvious that it has never arisen. The two decisions in the State Courts where the question has been passed on indicate a surprise on the part of those courts that a legislature should have the temerity to abolish this long existing defense to a crime. The basic nature of the right is sufficient explanation for

Judicial History and Criticism:

The rules established by Section 26-929 and Section 23-122 OCLA have been passed on by the Supreme Court of the State of Oregon in several decisions. The earlier decisions, such as *State* v. *Hanson*, 25 Ore. 391, 35 Pac. 976, were not too critical of the rule, but commencing with the case of *State* v. *Riley*, 147 Ore. 89, 30 Pac. (2d) 1041, the Court begins to re-examine the rationale of both rules. In the case of *State* v. *Wallace*, 170 Ore. 60, 131 Pac. (2d) 222, a full review of the rule is made. The Court comments that Oregon is the only State in the Union requiring such a strict burden of proof of insanity. In the Wallace case the rule is upheld but only after extended rationalizing by the Court.

In the case of *State* v. *Grieco*, 184 Ore. 253, 195 Pac. (2d) 183, the matter is questioned on constitutional grounds and the question is thoroughly and well presented to the Court in the brief of appellate counsel in that case. The Supreme Court of the State of Oregon said, quoting from page 262,

> "That the strong argument of counsel for defendant on this phase of the case would be more appropriately addressed to the legislature. As stated in State v. Hanson, 25 Ore. 391, 35 Pac. 972, referring to the statutory rule in this state relative to the burden of proof 'It is not in the province of the Court to question the policy of a law or to say that the rule established in such cases is inhuman, or that the state should in any contingency, be required to establish the fact of sanity like any other fact beyond a reasonable doubt.'"

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the absence of a direct decision by this Court on the subject. The State Courts have been too well schooled in the traditions of our Common Law and Constitutional Rights not to decide the question before appeal to this Court has been necessary.

The Court goes on to base their ruling not on any rational principle nor on an unbiased consideration of the authorities and reasoning of appellate but states

> "That the constitutionality of the act has never, until now, been challenged. We agree that counsel are not, by reason thereof, precluded from questioning the validity of the statute, but it is submitted that after a rule has been so well settled, a Court should, indeed, be reluctant to disturb it."

This case of *State* v. *Grieco* is comparatively recent Oregon law and, appellant and counsel for appellant therein were met in the court below with a considered and apparently final decision of the Supreme Court of the State of Oregon.

The case of *State* v. *Garver,* 190 Ore. 291, 225 Pac. (2d) 771, was not decided at the time of the hearing of our case before the Supreme Court of the State of Oregon. However, in commenting on questions raised in the Grieco case and the other precedents and in particular on the question of the morbid propensity statute, the Court on page 298 says as follows:

> "As indicated in State v. Wallace, supra, and State v. Hassing, supra, this statute ties the hands of the Court and prevents it from liberalizing the rules governing the insanity defense, *even though the Court should be of the opinion that these rules do not take sufficient account of discoveries of modern medical science.* We are unable, therefore, to sustain this assignment of error." (Italics added.)

In the decision of the Supreme Court in the case of *State* v. *Leland,* the case presented herein, we quote on page 638, (190 Ore. 598, 227 Pac. (2d) 785,

> "We are once again asked to hold unconstitutional the Oregon Statute 26-929 OCLA which casts upon

the defendant the burden of proving defence of insanity beyond a reasonable doubt and overrule the recent decision. In State v. Grieco, supra, we rejected that contention. We are also again asked to abandon the so called 'right and wrong test' of insanity and adopt the rule of 'irresistible impulse.' In State v. Garver we re-examined the question and reached the conclusion that, *even though we thought it desirable,* we could not, in the face of 23-122 OCLA abandon the rule of our decisions, that insanity as a defence to a crime is a disease of the mind which tenders a person in capable of understanding the nature, quality and consequences of act, or distinguishing between right and wrong in relation to such act. Nothing has been presented in this case upon this question not heretofore considered by us in the Garver case. We adhere to that decision. *We have heretofore recognized the harshness of the legislation with regard to the burden of proof of insanity."* (Italics added.)

Thus we have an often repeated recognition by the Supreme Court of the State of Oregon of the harshness and unfairness of these rules, yet a reluctance to change the same for fear of trespassing upon the rights of the legislative branch of the government of this State. We have a refusal, particularly in the Grieco case, to analyze whether or not this in effect does deprive the defendant of due process; and an attempt to excuse this refusal, not by any logic, by rather a weak and unlegal statement, that since the law has long been on the statute books of the State of Oregon that the same should not now be changed without the legislature taking action. This, of course, is an expression of the obvious uncertainty of the Court in face of the strong argument of the appellant therein. Had the Court been convinced of the constitutionality of the statute they would have rather buttressed their argument with something more appealing to logic than lame and half-assured reliance on negative precedent presented by the

former cases in which the constitutionality of this question had not even been raised.

That the law is harsh and unfair has been further recognized by the committee reports on criminal law and procedure of the Oregon State Bar Association. (See note 2.)

We have thus briefly outlined the history of the defense of insanity in the State of Oregon and brought the Court up to date on the attitude of the Supreme Court of the State and on this question. To sum up, it is recognized that Oregon has a harsh rule on insanity. We are the only state in the union that maintains this harsh rule, that the rule does not accord with medical progress and scientific fact but as stated in the quotation from *State* v. *Hassing,* 60 Ore. 81, 118 Pac. 195:

> "Although not a test of insanity, the knowledge of right and wrong is a test of responsibility."

The direct question of the constitutionality of this statute has not been raised until the case of *State* v. *Grieco,* supra, and the Court refused to meet the question squarely, using the long existence of the rule as the primary reason why the law should not be declared unconstitutional. It now devolves upon appellant to show this Court why the law should be declared unconstitutional and why the same deprives the defendant of due process of law as guaranteed by the 14th Amendment of the Constitution of the United States. (See Note 3.)

Note 2. The Oregon State Bar Associations' Committee on Criminal Law and Procedure recommended a reform of the Oregon Laws here put in issue. This recommendation was made both in 1950 and 1951. The legislature failed to act on the suggestion.

Note 3. We have reviewed the history of these rules in Oregon. In considering the refusal of the legislatures to correct the mistake of the original codifier of the Oregon Criminal Code, despite the repeated criticism of the State Supreme Court, it must be borne in mind that the State Legislature meets only once every two years, and then in a strictly

Basic and Substantial Rights Violated:

It cannot be seriously argued that the rules established by these statutes are merely procedural and not of a substantial nature. Rightly, the Supreme Court of the United States does not concern itself with the mere technique of justice, if the States afford substantial justice in their procedures. The question then is, is substantial justice afforded under the rules of these statutes. Certainly, a rule of evidence governing the burden of proof and what can be proven is substantial matter in affording or denying justice. See *Tot* v. *U. S.*, 319 U. S. 463, 63 S. Ct. 1241. Under the Oregon law a party is in effect barred from asserting a particular type of insanity and required if he pleads insanity to prove it beyond a reasonable doubt which in the chaotic state of this aspect of medical science becomes an impossible standard of proof.

We cannot conceive of it being seriously contended that the question of a man's sanity would not be an integral part of due process of law. To accuse an insane man of a crime and to punish him for the same would certainly not accord with due process of law but would rather be a capricious, arbitrary act by a sovereign. It would not be any less reprehensible and unjustified than the executions of so-called inferior persons of the German Third

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limited session. Until 1951 the legislators received pay for only forty days, and sessions seldom lasted longer than ninety days. The press of business is always so great that matters such as this are seldom considered and then lost in the midst of other and more imperative problems. There is no interested lobby or group pushing this not too popular change.

The failure of the State Supreme Court to correct this particular mistake stems perhaps from reluctance by a lower court to take a stand on an unpopular problem when the onus of the wrong done can be placed on the legislative branch. It was no doubt felt by the Oregon Court that in the proper case this matter would be decided by appeal to the U. S. Supreme Court. This no doubt would have done in the Grieco Case had the sentence been death, but since the penalty there imposed was imprisonment, the case was not appealed further. See State vs. Grieco, Supra.

Reich. A state cannot justly, by legislative fiat, deprive a person of his life or liberty. The commission of a crime implies a conscious wrongdoing. We cannot within the limits of due process punish a man for something beyond his moral control. See *Sinclair* v. *State*, 161 Miss. 142; *State* v. *Strasburg*, 60 Wash. 106. The question has, as above stated, never come before this Court. In the case of *Phyle* v. *Duffy*, 334 U. S. 431, 68 S. Ct. 1131, and *Solesbee* v. *Balkcom*, 339 U. S. 9, 70 S. Ct. 457, it was assumed that the assertion of a defense of insanity was a guaranteed right. The question involved in these latter cases was whether or not a judicial determination of insanity intervening after a trial was a right guaranteed by due process of law. Mr. Justice Frankfurter in his dissenting opinion in the case of *Solesbee* v. *Balkcom*, supra, discusses at great length the history of insanity of a defense to a crime, from which the following quotation is taken:

> "It is now settled doctrine of this Court that the Due Process Clause embodies a system of rights based on moral principles as deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. Due Process is that which comports with the deepest notions of what is fair and just."

The writer goes on to review the history of the origin of the limitation of the sovereign's right to punish the insane and their right to a trial by jury. He demonstrates that this right is so basic and native to our legal and cultural tradition as to be assumed when the question is raised before trial and conviction.

State Relieved of Burden of Proving Elements of Crime:

Further, Section 26-929 OCLA shifts to the defendant the proof of one of the essential elements of the crime charged. Blackstone has stated:

"To make a complete crime recognizable by human laws there must be both a will and an act." (Blackstone's Commentaries quoted in State vs. Strasburg, 60 Wash., 106, regarding insanity as a defense to a crime.)

To require defendant to prove insanity beyond a reasonable doubt shifts to him the burden of proof of one-half of the element of the crime charged, the willfulness. (See *Tot* v. *U. S.*, supra.) It goes without saying that the presumption of innocence is an integral part of our law and constitutional system, indeed, a part of the law of all civilized free men. The unique rule of the State of Oregon vitiates the whole idea of these basic principles. It in effect abolishes the defense of insanity.

Insanity is seldom an ever-present condition. It is, rather, a transitory condition between periods of lucidity. It is inconceivable how insanity at any particular moment could be proven beyond the reasonable doubt required by the unique Oregon Law. Barring the impossible situation of having medical witnesses to the crime, whether or not a person is insane or not at any chosen time would always be subject to some, not unreasonable, doubt. It would always remain more or less a matter of conjecture and probability rather than of moral certainty required by Oregon law.

Burden Shifted in Proof of First Degree Murder:

We have not here touched on the question of whether or not the Oregon statute deprives the defendant of his presumption of innocence. It suffices to say that this contention is implicit in the arguments above set forth. The shifting of the burden of proof to the defendant of such an important element of the crime as willfulness, premeditation and specific intent has the practical effect of shifting the burden of proof of the whole crime to the defendant. The

state, of course, will contend that this burden remained with the state, but how is a jury to determine the fine distinctions and intelligently find that burden which lies with the State of Oregon and that onerus burden which lies with the defendant. In this case, as a matter of fact, the only issue was that of sanity. Was not the real burden of proof on the defendant and that burden the almost impossible one of proof beyond a reasonable doubt? If a defendant cannot legally be excused from his act because he has a morbid propensity for such an act; and, yet, at the same time the State must prove a willfulness, premeditation and specific intent, do we have a further practical deprivation of due process of law by the resultant confusion?

Murder in the first degree requires malice, willfulness, premeditation and deliberation. These are all part of the State's case and must be proven beyond a reasonable doubt. When the Oregon law requires the defendant to prove his insanity beyond a reasonable doubt and denies him a right to prove at all as a defense to a crime, the "morbid propensity" that has destroyed his will power, we have a real shifting of the burden. It creates a presumption of guilt as surely as the offending statute in *Tot* v. *U. S.*, *supra*.

Due Process Requires Recognition of Scientific Reality:

The requirement that a person be afforded substantial justice and due process of the law is not frozen as of the date of the enactment of the constitution. It was rather an admonition and requirement that the reality of due process of law be accorded to citizens from that time forward by the states. Due process of law requires the states to accord to their citizens an opportunity to prove accepted scientific facts. Let us suppose that this Court were required to pass on the validity of a statute outlawing witchcraft and punishing the witch by execution in a lethal chamber, such as the defendant herein will be punished. Could this Court

ignore the fact that in the last part of the 18th century in the most civilized countries of Europe they were still punishing witchcraft by death? In this, middle of the 20th Century, such trials would be regarded as traversities on justice and monuments to superstition. Would not this Court require that state to take cognizance of recognized scientific progress, and would not this Court conclude that such a statute deprived a person of his liberty and life without due process of law? Is the analogy between that sort of a crime and punishment and the Oregon insanity rule far fetched? The whole science of psychiatry, the enormous expansion of the understanding of mental disease, the intelligent abandonment of a supersituous approach to moral aberration is a product of the past century certainly since *McNaughton's* case. Are we justified in permitting a statute which abolishes a defense to crime based on a recognized mental disease? Can this Court say that statute does not deprive a person of the right to prove his insanity and to excuse his responsibility under the law? In essence, ignoring medical progress and scientific reality does deny due process.

Prejudice Prevents Due Process:

In approaching this problem it is incumbent upon the Court to understand that persons charged with terrible crimes are usually friendless. In this case counsel accepted the task of defending the appellant with little or no enthusiasm but approached the problem as a duty both as citizens and as lawyers. The natural repugnance of orderly persons to unfortunates who suffer from the affliction that defendant suffers from tends to affect everyone connected with the decision of the case: the prosecutors, the defendant's attorneys, and the jury, and Court. They tend to become blind to the basic principle that we are punishing a wrong doing rather than eradicating a social problem. If

we assume that we may erradicate a social problem regardless of fault, then perhaps we should extend the rationale of the morbid propensity statute to do away with the poor unfortunates in our feeble minded homes or even to go to the logical conclusion of the materialistic philosophers of our century's extremes of statism.

Do not be deceived—these arguments are not far fetched. A reference to the press and editorials of this case will convince the Court that the spirit that moves the prosecution of crimes is not based on principles of orderly justice but is rather a mixture of vengeance, hatred, superstition, prejudice and expediency.

No one will seriously argue that the State of Oregon will be better off for preservation of the life of the defendant, but the persons who with honest certainty accept the premise that he can be done away with must blush to accept the equally logical premise that we could punish or do away with the chronic alcoholic who is a public charge or the mongoloid baby. It is of utmost importance that as a legal principle the premise that *there can be no guilt without fault* be protected by the 14th Amendment of the Constitution of the United States. This transcends any argument of whether a certain type of trial is guaranteed by the 14th Amendment or whether a person should have the right to a formal indictment or protection against self-incrimination. This goes to the very core, the essence, the heart of the democratic constitutional government.

It will be seen from the foregoing that our approach to the problem raised in our first assignment of error is not greatly affected by various contending theories of whether or not the 14th Amendment applies to all the first ten amendments to the Constitution of the United States, nor do we base our theory of the case on whether "natural justice" would require the State of Oregon to give us a more substantial process. We say that we have been denied due

process by the onerous burden of proof placed upon us, and denied any process with regard to the particular type of insanity from which our defendant is suffering by the morbid propensity statute of the State of Oregon. The abolition of due process of law even in the most open tyranny will seldom, if ever, take the form of denying a person some semblence of trial. Oppression always seeks to justify itself with form. The form of process exists in Oregon. The substance does not. The force of oppression here is not obvious but it is real. It is the oppression of expediency, superstition, prejudice and formalism, the oppression that we refuse to change a law not because it was a proper and constitutional one, but because it had been on the statutes for many years. It reflects a collective, constitutional psychopathy. It is lack of conscience just as the appellant herein lacked conscience; but it is lack of conscience not without fault, but a deliberate act of the sovereign in ignoring moral responsibility.

The constittuion of the United States is not a wooer of popular opinion. It is a standard by which popular opinion is kept within bounds. The natural reluctance of a court to infringe upon the legislative power of the several states is sensible. But the power to do so is essential to free government; and, when needed, it should not be exercised timidly or even reluctantly but should be exercised forcefully and effectually. It should be exercised here to correct manifest injustice.

Psychiatric and Medical Background:

The comments by Mr. Justice Frankfurter in *Solesbee* v. *Balkcom, supra,* and the comments and statements in other cases show that this Court is fully cognizant of the facts of psychiatric science. Counsel for appellant herein lacks the technical training, background and facilities to fully exhaust this interesting and important problem. It suffices to

say that most, if not all, of the authorities, in discussing the question of whether or not a constitutional psychopath is mentally ill, recognize the fact that this is indeed a disease, discuss its origins, prevention and possibility of cure. None of the modern authorities adhere to the original conception of what a constitutional psychopath is. They unanimously say that the causes of this condition can be several, namely, heredity, congenital disease, malformations causing a lack of blood circulation in the brain, improper diet, trauma, and a combination of the above enumerated causes. It is in the record of this case, see testimony of Dr. Evans, the State psychiatrist, by Dr. Williams, a state psychiatrist, by Dr. Haskins, psychiatrist called by the defendant but a recognized psychiatric authority in this state, and now two psychiatrists of the Roseburg United States Veterans' Hospital and by Dr. Dixon, defendant's psychatrist and also a recognized authority in this state, that this condition is a disease. It is also in the evidence of this case that it is a disease affecting the volitional powers of the sufferer and a disease inhibiting the exercise of will power.

All of the experts agree that the above listed causes can singly or in combination cause the condition. The probabilities of this having been caused by the accident are sustained by the testimony of the experts. Naturally, whether or not this was a single and lone cause cannot, at this late date, be determined absolutely; but, regardless, any of the causes were beyond the control of the defendant and certainly should not be chargeable to him. The import of the evidence of his personality change two weeks after the accident, of course, cannot be overemphasized and must be in lieu of other evidence taken to have been the main eitological factor. (See def. Exhibit 20.)

The State of Oregon has not seriously contended that the defendant's condition is other than a diseased condition. They have given no evidence to indicate that it was caused

by the defendant's own fault. Primarily, we believe, because none can be found but, secondarily, because of the antique condition of the Oregon law they felt that they were protected and that the realities of the condition would not become an important consideration in this case. Regardless, we must assume from the testimonies of their own experts and from all the medical texts which we have been able to examine that this is a disease caused by conditions beyond the control of the sufferer which cannot be successfully cured after adolesence; and, further, this is a disease that inhibits, and in effect, destroys the volitional power of the afflicted person. It is further to be assumed that when this inhibition of the volitional power is coupled with substandard mentality, as is here the case, that the sufferer is completely helpless. (See Exhibit 23.)

History of So-Called "Moral Insanity"

A brief review, by no means claimed complete, of the historical development of the treatment of constitutional psychopaths should be made at this time.

Our "morbid propensity" statute is an outgrowth of the history of this particular disease. Our attitude toward the burden of proof perhaps and probably is a result of the codifier's error, but it, too, reflects the then existing prejudice against the defense of insanity and the attempt by the legislature to, in effect, deprive persons suffering from this disease of the right to assert that defense.

A constitutional psychopath is a person who suffers from an inhibition of his volitional powers which renders him unable to control his actions with regard to right or wrong; although he may in effect recognize the existence of a difference. He is such a person who, when asked whether or not it would be wrong to kill someone, might answer it would be wrong; but, if the proper stimuli were applied, would kill the person without regard to the rectitude of the act and

without regard to the probability of punishment. He is exactly the person with whom we are dealing here. There are degrees of this condition. There are persons so afflicted who live in society without being recognized for what they are, and who adjust themselves to society insofar as they avoid the affliction of punishment; but they are never truly useful members of society nor are they able to place themselves with respect to obligations and future planning so that they completely free themselves from their constitutional affliction.

It is, however, not of too much import, to consider the constitutional psychopath who has adjusted himself to society. These persons are not completely afflicted with the disease and generally are of superior intellectual attainment and high intellectual quotient. Some are even important in their selected field. Their adjustment may be a result of their ability in overcoming their infirmity; and, when combined with a less severe condition, this may permit them to appear to the world as normal persons.

This condition was recognized since the 17th or 18th Century as "moral" insanity. There are cases recorded in the French and English criminal annals which are similar to the case at bar. These unfortunates recognized the fact of right or wrong but could not explain why they did wrong. To understand the development of the right and wrong test properly and to understand the approach of society to this type of crime we must place ourselves in the atmosphere existing at the time of the development of what came to be the Oregon rule. *McNaughton's* case, 10 Clark N. F. 200, 8 Eng. Reprint, 718, (*McNaughton's* Case, 1843, 10 Clark, N. F. 200) was decided before the development of the science of psychiatry existed and within 50 years of the time when the most advanced countries of Western Europe were still considering the propriety of trials for witchcraft. This case created a rule and test which had only one merit, that

of simplicity. Of course, its viciousness was not apparent; because of the ignorance of the times veiled the realities of the human mind and forbade the appreciation of the possibility of the progress which ensued in the next century. Most authorities of this period, the late 18th and early 19th century, regarded persons suffering from the affliction from which the defendant suffered as moral pariah. There was something lacking in their moral makeup, their spiritual nature; and thus, when this condition was first isolated and recognized, the sufferers were called "morally" insane.

Our criticism of the "right and wrong" test does not imply our client is able to differentiate or understands the nature of his acts. Rather, as Dr. Haskins testified, we claim he is not capable of distinguishing right from wrong. (Tr. 270.)

That the assumption that a person who is suffering from constitutionally psychopathic state is morally degraded and condemned should persist into the middle of the 20th Century offends the logic of all the writers who have commented on the subject. We are not ignorant of the condition. The etiology, the onset, the cure, and the duration of the disease are all known. It is also known that, as far as medical science has now progressed, a cure cannot be effected after a certain age. The effects of the disease are certainly known now as they have been for a long time, but a recognition of it as a disease is resultant from a full appreciation of the foregoing. Consequently, modern medical science recognizes that this is as much a question of mental disease as any other phase of mental aberration; and it is only because of the stupid adherence to non-fact justified by precedents by our Courts and legal profession that the constitutional psychopath is treated other than any other raving maniac. It is just this gross and unjustified stupidity, encouraged by superstitious prejudice, that has forestalled a proper attitude and treatment of this large bulk of unfortunates.

The classic expression of this illogic finds itself in the above quoted portion of the case of *State* v. *Greico, supra:*

> "But it is admitted that after a rule has been well settled, a Court should, indeed, be reluctant to disturb it."

This Court in the dissenting opinion of Mr. Justice Frankfurter in *Solesbee* v. *Balkcom* has commented on the necessity of a hearing on the question of insanity because of the confused state of psychiatric science. How much more does this apply to the requirement of the burden of proof. If the experts are confused how could we ever sustain the burden placed upon us?

Psychiatric and Medical Authorities:

Appellant's counsel have read a great mass of medical authority discussing the exact condition of the defendant in this case, and the unpardonable lag between medical science and legal precedent. We do not desire to encumber the record of this case with lengthy quotations from the innumerable medical authorities. We will instead recite a representative group of them and will rely upon the unquestioned testimony of Dr. Evans, the State psychiatrist, that this particular infirmity from which the defendant suffers is a disease of the mind which could have been and probably was caused by trauma, plus a combination of other causes, such as heredity, malnutrition, or infectious disease, all of which were beyond the control of the defendant. See pages 291 to 298, inclusive, Transcript of Testimony, for a review of texts used in trial and testimony establishing this as a mental disease.

One of the texts approved by the experts on cross-examination as an authoritative one is entitled "*A Textbook of Psychiatry for Students and Practitioners*" by D. K. Henderson and R. D. Gillespie: Dr. Henderson, Superintendent of the Royal Edinburgh Hospital for Mental Disorders, and

Professor of Psychiatry at the University of Edinburgh; Dr. Gillespie, prominent British medical psychiatric authority, Lecturer on Diseases of the Mind at the University of London and the University of Aberdeen. The book is published by the Oxford University Press and is the fourth edition, published in 1937.

> "Trauma may produce mental symptoms in one of two ways. Either it causes structural injury to the brain, or it causes emotional disturbances which in one form or another are prolonged for some time. In the first case the mental reaction is of the organic type, often with more subtle changes of 'constitution' or personality; in the second the result is usually a psychoneurosis. In the first group the injury is directly, or indirectly, to the head; in the second, the seat of injury may be anywhere—or nowhere." Page 62.

In *"Practical Clinical Psychiatry for Students and Practitioners"* by Edward A. Strecker and Franklin G. Ebaugh, Dr. Strecker is associated with Yale University and the University of Pennsylvania in the Department of Psychiatry, and Dr. Ebaugh is Professor of Psychiatry at the University of Colorado Medical School and director of the Colorado Psychopathic Hospital, and also National Chairman for the Committee of Mental Hygiene. This book was published in 1935. Quoting from page 68 of this book the psychopathic personality is described as follows:

> "In a strict sense psychopathic personality is a constitutional reaction, the kind of feeblemindedness other than intellectual in which there is commonly defective emotional control and lack of inhibition in the volitional sphere."

This definition was approved by all the doctors who testified in the case as being a correct one. See also *"Outlies of General Psychopathology"* by William Malamud, M.D., Professor of Psychiatry, State University of Iowa, and assistant director of the Iowa State Psychopathic Hospital.

A very clear discussion of a constitutional psychopath is given on page 370 of said text. This text was published in 1935 by W. W. Norton & Company. This book is an analysis of the constitutional psychopath and sets forth the fact that it is a condition which is both congenital and acquired and discusses the same in quite some detail.

In *"Textboof of Psychiatry"* by Prof. Dr. Eugen Bleuler, Director of the Psychiatric Clinic, in Zurich, Switzerland, the English version of this book was printed by The MacMillan Company, and the edition used is that of 1924. On page 569 of the text, under the heading of "The Psychopathies" we find the following language:

> "From what degree of the intensity and the grouping of the symptoms one wishes to designate the psychopath as sick is arbitrary, and from what degree one no longer wishes to consider him as a psychopath, but as insane, is not seldom the same. *Many psychopaths are really only in the social sense 'not insane'; before the forum of natural science they suffer from the same anomalies as many insane, only in a slighter degree; they are paranoid, schizoid, latent epileptics, cyclothymic, etc.*" (Emphasis in original text.)

There are other texts which we may cite, all showing that the general regard of medical authorities for this particular classification must be borne in mind and that the evidence in this case, particularly by Dr. Dixon, is that this was a most typical case of a seriously afflicted constitutional psychopath.

Medical Criticism of Legal Conception of Insanity:

We also refer to just a small part of the criticism directed at the legal approach to insanity as a defense to a crime. On page 580 et seq. of the *"Text Book of Psychiatry"* by Henderson and Gillespie supra, there is a discussion of the relations of psychiatry and law particularly directed at criminal responsibility. They discuss the unsatisfactory

situation as it exists in both England and United States in the legal profession's and court's antiquated adherence to the concepts of insanity and in particular to the so-called "right and wrong" rule. The criticism by the medical profession of the legal attitude toward insanity is not new. As early as 1838 Issac Ray in a treatise on *"The Medical Jurisprudence of Insanity"* published in Boston by Charles C. Little and James Brown stated as follows:

> "Much of the jurisprudence of insanity, in times past, bear the marks of crude and imperfect notions, that have been entertained by its pathological character, is not to be wondered at; but, it is a matter of surprise, that it should be adhered to, as if consecrated by age, long after it has ceased to be supported by the results of more extensive and better conducted inquiries."

In discussing Ray's work and other volumes, Gregory Zilboorg, chairman of the Committee on the History of Psychiatry, American Psychiatric Association, and instructor of the New York Psychoanalytic Institute, contributed in the American Psychiatry Centennial Edition 1844-1944 an essay on the *"Legal Aspects of Psychiatry"*, the same being published by the Columbia University Press in 1944. He castigates the attitude of the legal profession and the courts, both as to the right and wrong rule, the adherence to the idea of "moral insanity" which was the early definition of a constitutional psychopath, and generally reviews the various suggestions made, among them a strict regard of what medical science regards as mental disease as a test to guilt. Discussing the right and wrong test he shows where it has always been criticized and shows how the irresistable impulse test came into being as early as 1863. This in particular is critical of the McNaughton rule. The following language is used on page 565:

> "Yet only seventeen states of the Union recognize the irrestible impulse as a legitimate plea today. Moral

rather than scientific sensibilities are responsible for the prevalence of the right and wrong test—the test to which Ray objected in 1838, and which Sir James Stephen forty-five years later considered among the 'antiquarian curiosities' of the law."

He goes on to state that in 1847 Dr. Gould made the following finding in a report to the Legislature of the State of New York on the conditions in the State Hospital:

"That with scarcely an expection, its inmates had clear ideas of right and wrong and of the distinction between them; the same test has been applied in many of the asylums of our country, and the result has been, that not more than ten percent of the whole number would be exempt from legal responsibility under its operation, and these were so furiously mad as to be manifestly dangerous to be at large."

It is not feasible here to quote the numerous like statements in this excellent essay by Dr. Zilboorg, but we suggest that it completely supports our thesis on this assignment of error.

In the text above cited by Dr. Strecker and Dr. Ebaugh we have a typical case of the said discrepancy between scientific fact and legal attitude given on page 474 of that text and the authors comment on the case as follows:

"It is a typical constitutional psychopathic defect phenomena. The intellect is capable of appreciating that the conduct is considered wrong. The emotional-ethical sphere is so circumscribed that there is an absence of feeling about it.

"The situation, too, illustrates nicely, the inadequacy of our present medical-legal possibilities. In the instance of a man, a conscientious, very intelligent and sociologically minded judge could do nothing but sentence the man to a term of several years imprisonment. There was, of course, no charge against the woman."

We might add here that in a later edition of a text by the same authorities, a copy of which we were unable to obtain

at the time of the preparation of this brief so we are unable to cite the page here, the following language was used in reference to a psychopathic inferior or constitutional psychopath.

> "There is considerable dispute as to the etiological importance of injuries, but obviously it is significant enough. Other causative factors are congenital syphilis, birth injury, such inflammatory infections as meningitis and certain neurological diseases, *head trauma, endocrine disturbance and inbalance.*" (Italics added.)

It might be well to point out that Dr. Evans, the State psychiatrist, agreed that this was an accurate statement of the etiological factors to be considered in Morris Leland's case and it certainly is significant in the light of the personality change noted shortly after head injury when he was six years old.

Later on, on page 293 of the transcript, Dr. Evan agrees with the statement from a text by Dr. Harry C. Solomon of the Harvard Medical School and Dr. Paul I. Yakovlev, who is also an instructor in neurology at the Harvard Medical School, quoting therefrom:

> "Personality Disorders. Disorder of personality is common in minor degrees after severe head injury. The less severe the head injury and the more prominent the change, the more some predisposition to periodic mood disorder should be sought. The psychopath tolerates head injury badly, and here the emotional disturbance is more important than organic damage sustained. A severe disorder in personality following a brief amnesia (e. g. less than six hours) is to be attributed to emotional factors and predisposition."

The medical texts on both points are numerous and the facts claimed by appellant are nearly unanimously approved by medical thinkers. We have confidence that as

indicated by Mr. Justice Frankfurter in *Solesbee* v. *Balkcom, supra,* that the Court is aware of this situation and able to supplement our, by no means complete, citation of medical authority.

Due Process Requires Law to Keep Abreast of Scientific Progress:

Let us say this in closing on this particular phase of our argument, if the Courts refuse to look at all phases of reality as they are accepted by the experts in the fields involved; but, because of external pressure, they adhere to abandoned and the discredited ideas which represent the thinking of past years, which at that time could be accepted because of the poor development of the science involved, you will have a deprivation of due process of law. We cannot stress too strongly that the vitality of constitutional government and government by laws requires judicial courage to keep abreast with reality—even in unpopular decisions. Ten thousand legal precedents will not make Copernicus wrong. We know the earth is not the center of the universe. We know fully as well that the appellant herein is suffering from a disease as real as a broken bone. The State of Oregon cannot justly punish a person because he is sick. The people in the State of Oregon are prohibited by the 14th Amendment to the Constitution from doing so. The Supreme Court of the State of Oregon did not protect the people of our State from this injustice. They acknowledged an obligation of the state by blaming the legislature for not having corrected the condition. There is no higher Court than the United States Supreme Court for the appellant to appeal to. This decision squarely decides whether or not the sovereign, in this case the State of Oregon, is bound by the principles of moral justice, by the realities of scientific progress, and by just good common sense. This decision will decide whether the 14th Amendment of the

Constitution acknowledges the foregoing as a basis of our constitutional government and due proces of law. If there can be guilt without fault despite the 14th Amendment of the Constitution then our vaunted democracy is an idle boast and the state can and will engulf us all. Unless there is a restraint on what the State can do, and that basically is a question of punishing only where there is a conscious wrongdoing, we, by implication, validate the tyrannies of both the right and left that have so punished our generation.

Question Involves Due Process and Is Not Dependent on Bill of Rights:

The logic of our stand, we feel, is unassailable but to rely solely on logic and principle in argument might imply a weakness. If we search for precedent we could not possibly find a more unambiguous statement of our case than the language of *Tot* v. *U. S., supra.* In so many words, they say *this is not permissible* * * * that is, *it is not permissible to put on the defendant the burden of proof,* that the presumption of innocence is a matter of due process of law, that to destroy that presumption of innocence by some evidentiary subterfuge violates the 14th Amendment of the Constitution of the United States. This is not a mere question of an indictment, *Hurtado* v. *California,* 110 U. S. 516, 4 S. Ct. 111 and 282. This is not a mere question of whether or not the state can appeal, *Palko* v. *Connecticut,* 302 U. S. 319, 58 S. Ct. 149. This is not a mere case of whether or not a defendant must testify if commanded by the State, *Twining* v. *New Jersey,* 211 U. S. 78, 29 S. Ct. 14. This is not a mere question of whether or not a person is entitled to a jury trial, *Maxwell* v. *Dow,* 176 U. S. 601, 20 S. Ct. 448. This is not a mere question of whether or not a District Attorney can comment on whether a man testifies, *Adamson* v. *California,* 332 U. S. 46. 67 S. Ct. 1672. This is not a

mere question of whether a man is entitled to a trial after he has been convicted on whether or not he is insane, *Phyle* v. *Duffy, supra, Solesbee* v. *Balkcom, supra.* This is not even a question of whether the 1st Amendment to the Constitution of the United States applies to the states, *DeJonge* v. *Oregon,* 299 U. S. 353, 57 S. Ct. 255. This is a question on the substance of due process of law. This is a question which goes to the very heart of the 14th Amendment. This is a question of whether or not the State of Oregon can, by rigging the important processes of legal trial, deprive a person of a fair trial. A failure to throw out these statutes is to violate the 14th Amendment of the Constitution of the United States. Can precedent permit the creation of this presumption just so long as the form of a trial is accorded? The 14th Amendment of the Constitution of the United States accords the substance not the form of process. See *Mugler* v. *Kansas,* 123 U. S. 623, 8 S. Ct. 273.

Regardless of Kind of Tribunal, Due Process Would Be Denied:

In considering this point the Court should bear in mind that it makes no difference whether or not the defendant is tried by a Court sitting alone, a panel of experts, or psychiatrists, or a jury. We are not questioning anything but the burden of proof. In any one of the aforementioned types of trial the defendant would be met by the same problem. Each trial agency would be bound by the same rule of proof. We are not therefore basing our contention of this assignment of error on any of the first ten amendments of the Constitution of the United States but rather we place it squarely on the due process clause of the 14th Amendment and assert that here is an instance where due process has been denied. The process accorded was not due process and was calculated in effect to totally deprive the dependant

of the right to assert a substantial defense to a crime charged. In the case of *Herbert* v. *Louisiana*, 272 West 312, 47 S. Ct. 103, 48 ALR 1102, Justice Van Devanter stated with regard to the 14th Amendment:

> "What it does require is that State action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and that not infrequently designated 'the law of the land'. Those principles are applicable alike in all states and do not depend or vary with local legislation."

We can state that it would make no difference whether or not a panel of experts or the Court itself were to consider the question presented to the jury in the Circuit Court of Multnomah County, if they were governed by the same burden of proof. They would have to under the law of the State of Oregon say the defendant could not rely on his type of insanity as a defense to the crime; and, further, that even though he could so rely or even though he may have proven that he might probably have been insane under the Oregon law, that there would always be a reasonable doubt whether or not he did the act charged while suffering under the disability of insanity. Barring a completely degenerated mind, which degeneration would probably have to be evidenced by some objective and non-psychiatric symptom, it would be impossible to prove a person insane under the Oregon law.

The argument set forth above does not ignore the fact that there has been a development of various theories regarding how far the 14th Amendment of the Constitution of the United States goes, both as to protecting citizens of the United States and as to the due process clause. We think that the question involved does not depend on any of the amendments constituting the Bill of Rights but rather

squarely falls within the purview of the due process clause of the 14th Amendment of the Constitution of the United States.

If this assumption needs any support, and we think it is apparent on its face, we again cite the Court to the case of *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241. In this case the defendant was convicted of having firearms in his possession after having been convicted of certain felonies. There was a statute passed by Congress which created a presumption that a person having said firearms in his possession was presumed to have received said firearms through interstate commerce. Defendant was convicted, and there was no proof other than presumption created by this statute. The Court held that this presumption was invalid and violated the due process law of the 5th Amendment of the Constitution of the United States and said as follows:

> "That Congress has power to prescribe what evidence is to be received in the Courts of the United States. The section under consideration is such legislation. *But, the due process clauses of the 5th and 14th Amendments set limits upon the powers of Congress and that of the State Legislatures to make the proof of one fact or group of facts evidence of the existence of the ultimate fact in which the guilt is predicated.*" (Italics added.)

The Court goes on to say on page 469,

> "It might be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the Legislature might validly command that the finding of an indictment or the mere proof of the identity of the accused should create a presumption of the existence of all facts essential to guilt. *This is not permissible.*" (Italics added.)

Other Constitutional Rights Violated:

In placing the argument of this assignment of error squarely within the Due Process Clause of the 14th Amendment, we do not mean to imply that it does not come within the Privilege and Immunities Clause thereof. See *Slaughter-House* cases, 16 Wall (U. S. 36). The excellent dissenting opinion of Mr. Justice Black in the case of *Adamson* v. *California,* 332 U. S. 46, 67 S. Ct. 1672, discusses at great length whether or not the Privilege and Immunities Clause and that part of the 14th Amendment making citizens of the United States citizens of the state in which they reside, should apply as restrictions on the states and extend the first ten Amendments as restricting the states. Certainly it can be sustained by logic and reason; however, the oft repeated decision of the majority of this Court that they will not extend the same, cautions us to place the onus of our argument on the fact that due process itself is involved in the decision of the case at bar.

Nevertheless we feel that the deprivation of the rights guaranteed to appellant herein is of such an extreme nature that it also deprives him of his rights as a citizen of the United States. It is such a deprivation of civil rights that the Federal Government has protected by constitutional provision and legislation.

To summarize this argument let us say: That where a single jurisdiction requiring such a burden of proof which runs counter to all the background of criminal law and the constitutional development in this country, it devolves upon the reviewing authority to scrutinize the matter closely. When we add to this the oft repeated criticism of the Supreme Court of the State of Oregon and the Bar of the State of Oregon against the rule of the burden of proof and the rule denying the right to prove a certain type of insanity, there rests a presumption that there is something basically wrong with the Oregon law and that it offends the Consti-

tution of the United States. This presumption we feel requires the State of Oregon to go forward and show some reason other than the repetition of precedents or citation of cases showing the justified reluctance of this Court to overrule the State decision. The state is required to argue principles not precedents and we feel that the principle and logic of the argument is so overwhelmingly in our favor that we must prevail on this point.

ASSIGNMENT OF ERROR NO. TWO:

The Courts below erred in upholding the refusal of the trial Court to make available to defendant's counsel before trial a confession taken from defendant before he was advised of his right to be represented by counsel and before he was taken before a magistrate as provided by law, and that said error deprived defendant of his life and liberty without due process of law as guaranteed by the 14th Amendment to the United States Constitution.

Oregon Laws, Section 26-1542. *Prisoner to be taken before magistrate: Proceedings of magistrate.* If an arrest is made in this state by an officer of another state in accordance with the provisions of Section 26-1541, he shall, without unnecessary delay, take the person arrested before a magistrate of the county in which the arrest was made, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the magistrate determines that the arrest was lawful, he shall commit the person arrested to await for a reasonable time the issuance of an extradition warrant by the governor of this state. If the magistrate determines that the arrest was unlawful, he shall discharge the person arrested.

Section 26-1547. *Rights of defendant: Information as to charge: Aid of counsel.* When the defendant is brought before a magistrate upon an arrest, either with or without warrant, on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel, before any further proceedings are had.

Section 26-1556. *Statement of defendant: Informing defendant of right to make statement.* When the examination of the witnesses on the part of the state is closed, the magistrate must inform the defendant that it is his right to make a statement in relation to the charge against him; that the statement is designed to enable him, if he sees fit, to answer the charge and explain the facts alleged against him; that he is at liberty to waive making a statement, and that his waiver cannot be used against him on the trial.

ARGUMENT

Oregon Rule Destroys Rights Guaranteed by Statutes and 14th Amendment:

We respectfully submit that the conduct on the part of the State of Oregon with regard to the prosecution of this crime did not accord with the limitations of the 14th Amendment. We have particularly assigned under this assignment of error the failure of the District Attorney to permit the appointed counsel of defendant-appellant to see or examine the confessions taken from defendant before he was aware of his right to counsel, and before he had been taken before a Magistrate as required by Oregon law, Section 26-1542 OCLA; and informed of his right to counsel, 26-1547 OCLA; and right not to make a statement, 26-1556 OCLA.

As is required by the Oregon law set forth in our brief, in the Court below, a person charged with a crime should be taken immediately before a Magistrate and informed by him of his right not to make a statement and his right to counsel if he so desires. The law has been negatived and the effect of it destroyed by the case of *State* v. *Butchek*, 121 Ore. 141, 253 Pac. 367. This case stated that it is proper for an officer to question a person before he has been taken before a Magistrate, and that the officer did not have to tell him that he had a right to counsel nor warn him that what he might say might be used against him. Resulting from this de-

cision are a line of cases in the Oregon Courts which finally culminated in the case of *State* v. *Folkes*, 174 Ore. 568, 150 P. 2 d. 17, in which a Negro defendant charged with rape made a confession, after a long questioning, and on the promise of being taken to see his mother and given a meal of pork chops and a pint of whiskey. As a result of such a confession, the defendant was sentenced to death and executed for a rape murder allegedly having taken place on a train in Oregon during the war.

State Fully Prepared Before Defendant Allowed Counsel:

This is not a case in which we were accorded the spirit of due process of law. The defendant was kept awake for a period of at least 32 hours. He was not taken to a Magistrate until after he had made two confessions and until after the State's case was completely prepared; and he was induced to make a confession by the vicious representation on the part of the State's Attorney and the Chief of Detectives of the Portland Police Force that *he could use the confession in the preparation of his case.* In so many words, as quoted from the transcript of testimony, they told him that the confession could be used *for or against him.* See transcript of testimony, pages 119, 129, and 143. This is unequivocally established by three different statements in the record.

Several days after the taking of the confessions and after his indictment by the Grand Jury of the State of Oregon, the Circuit Court of the State of Oregon for the County of Multnomah, appointed counsel to serve on behalf of the defendant. Under the Oregon statute counsel are allowed a nominal fee, which in this case has long since been exhausted in out-of-pocket expenses by counsel which have not been compensated by the Court. We want to call the attention of this tribunal to the fact that the reality of complete representation has not been accorded the defendant. We are

serving in this capacity within the limits of our capabilities, and o' substance, and will see that the spirit of the Constitution of the United States as expressed in the 14th Amendment is complied with even though it may result in a personal sacrifice on our part.

The question becomes important however when we reflect on the fact that when counsel were appointed for the defense of the defendant, and when they began the investigation of the case, they were refused access to the confession that had been taken from the defendant before he was given a preliminary hearing, before he knew that he had a right to counsel, before he was warned of his rights with regard to making a statement and on the pretext that he could use the same for him or against him. We asked to see this confession and were refused. Counsel for defendant have represented several persons charged with crime in the State of Oregon. It is the first time that we were refused cooperation from the District Attorney's Office in the County of Multnomah, State of Oregon. It was the first time that we were not given every consideration in the trial of a case. It was the first time counsel was appointed in a case which was headline news in the State of Oregon over a period of several days and which was stirred up in particular by the Oregon Journal as appears in our first assignment of error in the Court below and which is not a matter of issue here. See brief below, page 14 et seq.

Court Refuses to Consider Motion:

When met with this proposition and this unusual conduct on the part of the District Attorney's Office, counsel filed a motion for continuance and to be permitted to see the confession. The motion for continuance was twice denied. The first time a token continuance was allowed but in reality the motion was denied. The second time the motion was denied in its entirety. The motion to see the confession was

denied in a peremptory manner and without the Court even so much as examining the confession. It was denied in such a manner that the argument of counsel was dismissed with "I know of no reason why you can see the confession" (See transcript page 51), and we were not permitted to state the strong grounds upon which we demanded the same. It might be here interjected that at the time we did not know that they had told our client he could use the confession during this trial and that it could be used for or against him as testified to by Captain Brown. If we had had this information the picture might possibly have been changed. We also renewed our demand when this information was available and asked that the confession be excluded. It suffices to say that we were dealing with a subnormal mentality which was not capable of assisting in its own defense and that our information was not complete with regard to the confession. This is just one of the incidents that we suffered from in the preparation of the case and it certainly is significant and typical of the problem with which we were faced.

Effective Counsel Guaranteed:

The case of *Powell* v. *Alabama*, 287 U. S. 45, 53 S. Ct. 55, establishes that a person charged with a crime has a right to effective counsel and that the failure of the Court to accord that person that kind of counsel is violative of the 14th Amendment of the Constitution of the United States. As a corollary of this right to counsel, the counsel appointed to defend the party charged has a right to due process of law in defending the party charged. We will assume that this right is a real one and not a formal or unsubstantial thing. We will claim in this assignment of error that counsel was appointed late in the case and after the State's case had been completely prepared and after the State had thoroughly imposed on the affliction of defendant. We will claim, and we

believe the facts will prove, that this imposition was deliberate, that the preparation of the State's case was hurried in order to avoid the defendant's being represented by counsel; and that once having taken this case into its hands and completely tied the matter up in their own minds, the State of Oregon, fearful of adverse publicity by an excited press, did not dare to permit the appointed counsel to see the confession made. The reason they did not dare is that the confession itself, if it had been properly given to a psychiatrist for consideration, would have shown that the defendant did not know the difference between right and wrong, did not have the capacity to commit a crime, was insane, was suffering from a disease as real as a broken bone. The confession itself reflected all these facts, and if the defendant had been accorded the right to use it for himself as was promised when the confession was taken, the defendant would not have been condemned to death in the lethal chamber. One of the most vital issues in the case was whether or not defendant acted on the spur of the moment or after deliberation. The confession itself contained the statement:

> "Q. Well, when you killed her, what made you make your decision that you should kill her?
>
> "A. It just came to me (snapping fingers), just the second she started screaming." (Plaintiff's exhibit 15. Tr. of Rd. 363.)

See the whole exhibit 15 for the full importance of this error.

14th Amendment Violated:

This Court has spoken quite emphatically with regard to the improper taking of a confession. See *Malinski* v. *New York*, 324 U. S. 40, 65 S. Ct. 781; *McNabb* v. *U. S.*, 318 U. S. 332, 63 S. Ct. 608. There has been a tendency to modify the holding of the *McNabb* case which was primarily based on the requirements of the Federal Code of Civil Procedure

when the states have not accorded to the defendants charged with crimes against their sovereignty the protection of being taken before a Magistrate and informed of the right to counsel and informed of their right against self-incrimination. There is, so far as we have been able to determine, no clear cut statement by this Court that when a state guarantees certain basic rights in their statutes, as does the State of Oregon, that these statutes can be circumvented as they have been in the case of *State* v. *Butchek, Supra,* and the subsequent cases of the State of Oregon culminating, in the opinion of counsel, in the gross injustice of *State* v. *Folkes, supra.*

Whether or not the provisions of the 14th Amendment extend in protection of the Bill of Rights to these confessions, or whether or not the principles of "natural justice" would command this Court to negative the improper taking of a confession is not the crux of the argument. We feel that the conduct of the State, assigned as error herein in depriving the defendant of effective counsel, deprives the defendant of due process and certainly deprives him of his civil liberties as a citizen of the United States, which is protected by the Privileges and Immunities Clause of the 14th Amendment of the Constitution.

The case of *Powell* v. *Alabama, supra,* requires that a person is entitled to *effective* counsel. There are other cases subsequent to this so-called *Scottsboro* case which have re-emphasized this right to counsel as being a part of due process. We consider the action of the State of Oregon brash in depriving the defendant herein of effective counsel by denying the counsel the right to examine and use the confession taken, particularly when the same was taken on a pretext that it could be used for him or against him as will be hereinafter shown. Remember, also, counsel were attempting to defend a sub-normal and insane person, unable to effectively assist them in the defense.

Error Prejudicial:

That our inability to use the confession was a matter of substantial importance in the trial of the case will be shown by a reference to the opening argument of the case by Mr. Ryan. (See Tr., page 52):

> "Mr. Ryan: Ladies and Gentlemen, in a case of this kind the defendant's attorney is at a particular disadvantage by virtue of the fact that the evidence in a case of this type is entirely in the hands of the District Attorney's office. We have made request to the District Attorney's office personally, we made a request before the court here before the trial started the other day, and we renewed that request this morning——
>
> "Mr. Collier: Just a minute, your Honor——
>
> "The Court: Mr. Ryan, your statement is objectionable. Matters addressed to the court are no concern of the jury. It is the court's responsibility. I say, of no concern to the jury, except as matters might later be presented to the jury in some form or manner. You may proceed.
>
> "Mr. Ryan: I am trying to say, Ladies and Gentlemen of the Jury, we don't know what Morris Leland stated to the police officers or stated in his confession. We don't have that information."

The further effect of this refusal is of probably greater importance, because the defendant's counsel were not able to have adequate psychiatric advice on the condition of mind that the confession elicited regarding the defendant and the further problem in preparing the direct examination of the defendant's psychiatrist.

Modern and Majority Rule Supports Appellant:

The additional reasons why this amounted to the denial of due process will be set forth more fully as this argument is developed.

There are many cases in which the question of the right to

examine a pre-trial confession or other evidence in the possession of the District Attorney has been decided. In an annotation in 52 A.L.R. commencing on page 201, some of these cases are discussed. There are two Oregon cases involved before the case at bar, *State* v. *Yee Guck*, 99 Ore. 231, and *State* v. *Brake*, 99 Ore. 310. Both of these cases base the question of the right to a pretrial examination on whether or not the evidence sought to be examined is admissible. Naturally this evidence has been deemed admissible by virtue of the fact that it was admitted into evidence. We are aided in this question by a statute, *10-401 OCLA*, which we claim gave us this right.

> "10-401. *Inspection of books and papers.* The court or judge thereof, while an action or suit is pending, may order either party to give the other, within a specified time, an inspection and copy, or permission to take a copy of any book, document, or paper in his possession, or under action or suit, or the defense therein. If obedience to the order be neglected or refused, the court may exclude the book, document, or paper from being given in evidence, or if wanted as evidence by the party applying thereof, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party so neglecting or refusing as for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, documents, or papers, when he is examined as a witness."

If this statute had been non-existent we would still have had the right under the Privileges and Immunities Clause of the 14th Amendment and Due Process Clause of the 14th Amendment to the Constitution of the United States. The reasoning of the weight of authority and the more modern rules as annotated in the above citations from 52 A.L.R. is set forth in the case of *State* v. *Tippett* (Mo.), 296 S.W. 132, as follows:

"The general rule denying the inspection of documents in the hands of an adverse party has been greatly relaxed in modern cases. In civil cases an inspection of documents in the hands of opposing parties . . . upon motion, has been allowed. The cases seem to hold that it is a matter of indifference whether the document to be examined may be of actual benefit to the party filing the motion to inspect. If from the motion the document may be material, the right of inspection obtains . . . We are unable to perceive why the privilege should not obtain in a criminal case, although we have been unable to find an authority in point . . . That it was desired that the state's evidence remain undisclosed partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be, and is, too jealous of according a defendant a fair and impartial trial, to hinder him in intelligently preparing his defense and in 'availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial."

The Louisiana court has passed on this question and reversed earlier decisions on the ground that their earlier decisions denied due process of law. See *State* v. *Dorsey*, 207 La. 928, 22 S. (2nd) 273:

"Under the provisions of the Constitution of the United States and this state, every accused is entitled to, and is guaranteed, a fair trial, and to deny his counsel a pre-trial inspection of the accused's written confession is, in our opinion, tantamount to depriving such accused of a fair trial, and is in violation of his constitutional rights. This being so, Section 976 of the Revised Statutes must yield insofar as it may deny this right."

This was a case which was almost on all fours with the case at bar excepting insofar as there was no representation by the police that the defendant could use the confession in

the preparation of his case and in the trial of his case, nor was the defendant sub-normal and insane. Thus our case is a stronger one than this cited case which emphatically states that the Constitution of the United States gives this right to pre-trial examination.

Court Failed to Exercise Any Discretion:

In the case at bar the Supreme Court of the State of Oregon acknowledged that the statute, *10-401*, applied to criminal cases. See *190 Ore. at page 615*. The Supreme Court also sought to justify the upholding of the conviction herein by reasoning that the refusal of the lower Court to grant an examination of this confession was not an abusive discretion. Nowhere did they consider the insupportable argument by the District Attorney that this confession was his own property. See transcript page 50. They instead based their decision on its being a matter within the trial court's discretion. They did not discuss whether or not the trial court exercised any discretion. They did not consider that the trial court did not even so much as look at the confession, let alone read it. They did not examine the record of the case to see that the trial court's approach to the problem was one of non-concern, and its decision of the problem was peremptory dismissal which shows even today on the cold record of the case that no discretion was exercised. The matter was never really considered, the motion of counsel for defendant was treated as an annoyance and not something that required the exercise of judicial discretion.

Confession Induced by Fraud:

Absent from the consideration of this question was the three-times repeated statement by the State that the confession was taken on the representation that it could be used for or against the defendant. Counsel is confounded by what appears on pages 616 and 617 of 190 Oregon regard-

ing the Court's discussion of this question. It is sandwiched in without explanation or decision and conveniently ignored.

Use of Confession Necessary to Fair Trial:

The lower Court goes on to discuss the question of whether or not the failure to have the confession available to counsel for defendant injured counsel for defendant in the trial of the case and goes on further to say that the confession was introduced sometime before Dr. Dixon testified. Neither of the counsel for defendant had had a murder case. It is unfair, arbitrary and a deliberate ignoring of the practicalities of the trial of the case to expect counsel to withdraw from evidence, in the few hours accorded them for rest and the preparation of the next day's trial, and discuss a confession with a psychiatrist who; as the record of this case will disclose, is difficult to contact. The Court seems to excuse itself by this reasoning. The Court entirely ignores the fact that the whole trial of the case turned around this confession; that the tenor of the questioning of the jurors on the voir dire, the opening statement and the questioning of all the witnesses prior to the introduction of this confession turned around it. The importance of the confession can be only understood when the Court reads the confession and finds that this alone was the evidence of the commission of the crime and the State of the defendant's mind at the time.

The casuistry indulged in by the Supreme Court of the State of Oregon in avoiding a reversal on this point is only exceeded by that Court's avoidance of the question of the burden of proof in our first assignment of error. A reading of the case will indicate even to a person casually interested that the Court was unsure of this point but felt that it must be disposed of contrary to the interests of the defendant. Counsel represents to this Court that they sincerely

feel that had they been permitted a pre-trial examination and use of the confession that the verdict in the case at bar would have been different and the defendant would not be now condemned to death.

The lack of confidence of the District Attorney in his stand on this question is limned by the only argument he could summon on the motion, to-wit: that it was his own private property. The Supreme Court didn't even deign to discuss this question. We feel that had we known at the time of the argument of the original motion of the representations of Captain Brown of the Police Force, that perhaps the Judge might possibly have been moved to be more concerned and have informed himself sufficiently to be able to exercise a modicum of discretion. We know that after the trial had progressed he did not want to reverse his original decision because perhaps it might have cost the County of Multnomah for the State of Oregon a few hundred dollars to retry the case. This question presents to this Court a problem which has not arisen before.

It suffices to say there is a definite split of authority in the state decisions, and that those holding against our contention do not consider the question of the violation of the 14th Amendment to the Constitution by a refusal to permit the examination requested herein. The better reasoned cases, however, do discuss this question; and, in order that appointed counsel be effective in protecting the rights of their client, this right is essential.

The states in their own constitutions and statutes give certain rights and protections that are symbolic of due process of law. If in the decisions of the cases such as *State* v. *Butchek* and *State* v. *Folkes*, *supra*, these rights are vitiated and these protections rendered nugatory, it is incumbent upon the Court of final resort on questions involving the United States Constitution to render them effective. The rules set down in the *McNabb* case grew out

of the Code of Federal Criminal Procedure. They are not, however, unimportant when it comes to the consideration of the bare minimum of substantial justice that a state must accord.

From personal experience counsel know that a metropolitan police force convicts persons by obtaining confessions either legally or illegally. One of the principles of good police work is to preclude a person from seeing an attorney or getting even an inkling that he is entitled to any right until the case is tied up in a neat package. *State* v. *Butchek, supra,* and *State* v. *Folkes, supra,* implements this purpose. They defy the spirit and substance of the constitutional protection of due process of law and of the national citizenship, that each state citizen enjoys. There must be a limit somewhere. There must be an instance where the Federal Constitution gives protection of a real nature. Certainly in the case at bar we have an extreme instance of the imposition of police methods on the defendant. Standing by themselves they would no doubt render questionable the validity of the confession taken, but coupled with the fact of the request by defendant's counsel when appointed of a right to examine the confession (which at that time counsel thought was only one confession) the question becomes a basic one and requires this Court's action. Add to it the problem created by the unequivocal representations that the defendant could use this confession, we have a confession as much obtained by force, by denial of due process as any of the cases which this Court has considered. This confession was in fact obtained by fraud.

We again allude to the failure on the part of the Supreme Court of the State of Oregon to discuss logically the questions we here raise and we again state that this is typical of the prosecution of the case in both of the lower Courts.

Either there is a right of an ignorant, subnormal, insane person to have some real protection or we should drop the

masquerade and admit that the states are free to impose themselves on those who are stupid or unfortunate enough not to know their rights. Either we should admit that the appointment of counsel is an empty form to be fulfilled after the state has an ironclad case, or we should give that appointed counsel effective weapons with which to prove the facts of the case. This assignment of error is vitally connected with our first assignment of error and is typical of the prosecution of mentally sick unfortunates under Oregon law.

We submit that this assignment of error has shown a deprivation of defendant's rights under the 14th Amendment of the Constitution and by itself justifies, indeed requires, a reversal of the Courts below.

ASSIGNMENT OF ERROR NO. THREE:

The Court below erred in sustaining defendant's conviction and sentence to death in the lethal chamber.

ARGUMENT

We have assigned error in the general conduct of the trial below and while we are not discussing in detail this error we call the Court's attention to the failure of the Supreme Court of the State of Oregon to accord due process of law in the errors assigned therein. See statement of facts and briefs in the Court below.

As herein stated, we are not relying on this assignment of error to determine this Court's decision and we will not burden the record with an argument at length on it. The substance, however, is well demonstrated in the fact of the admission of such ugly and emotion provoking exhibits as gruesome pictures, a bloody knife, torn and bloody clothing, and a long and detailed testimony by the morgue's physician, said testimony being in front of the jury, holding a picture of the naked and torn body of the defendant before

them while he testified to facts that had no relevance to the admitted issue of the case. We know that under this assignment of error this Court will not reverse the case, but this assignment of error does tend to show the atmosphere under which counsel labored to discuss a fact, which if it had been approached unemotionally and by an unbiased and unprejudiced jury, would unquestionably have been decided on the medical evidence, the documentary evidence, and other evidence tending to show defendant's insanity.

Conclusion

This case is more important than the fate of the defendant, not that his fate is to be disregarded. It will demonstrate whether or not a state can ignore scientific reality, a fair trial and due process of law as we have shown it has been ignored herein. We know that the State of Oregon in answering our brief will rely on precedent and the natural reluctance of the Supreme Court of the United States to overrule an established legislative or judicial law of a state. We cannot here conceive of any logic or principle which can supply force to the anticipated argument. We will not discuss here the fact that some persons in times gone by have said that if we accorded protection of the defense of insanity to all persons who were mentally ill we would have insane asylums in every county. It suffices to say that we have permitted the ugliness of sex crimes, of senseless murders, vicious robberies, and untold petty offenses to continue because states such as Oregon through inertia or by force of prejudice have refused to look reality in the face. These states have refused to accord to persons charged with a crime due process as is directed under our Constitution and the ethics of Western Civilization, that due process which says that a person cannot be found guilty unless he is at fault. A repetition of such a holding in this Court will be indefensible. It will be just as causative of future rape-

murders as was the tragic negligence of the Oregon State Hospital in discharging this man because they were crowded.

The counsel represent that they feel deep pride in being accorded an opportunity to help define a question as basic as this, and they express faith that their concept of the moral dignity of any human being, however debased by disease, will be recognized under the laws of this nation. They believe that the Constitution of the United States is not a historic document but is rather a vibrant charter, protecting and expanding the rights of the citizens of this great land. They believe that it will accord substance rather than form and will not hide itself in a scabbard of precedents nor blunt its force against the wall of unconcern and prejudice that envelops such cases as this. We are convinced it will cut through the confusion of this and other similar cases to the core of reality and afford real justice.

Respectfully submitted,

THOMAS H. RYAN,
ANTHONY PELAY, JR.,
JOHN D. RYAN,
Of RYAN & PELAY,
HAROLD L. DAVIDSON,
Counsel for Appellant.

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